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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO MALDONADO,

Defendant and Appellant.

B196958

(Los Angeles County
Super. Ct. No. BA036027-01)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Kathleen Kennedy-Powell, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Fernando Maldonado and three other men kidnapped and repeatedly sexually assaulted two victims over numerous hours. On appeal, Maldonado argues that his convictions for forcible rape in concert, forcible oral copulation in concert, and forcible sodomy in concert should be reversed on the basis of instructional error. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Maldonado and three other men kidnapped two women at gunpoint and took them to an apartment where the four men spent hours sexually assaulting them and threatening to kill them with a firearm and a knife. Many of the assaults involved two men at once, and the men changed positions frequently. Maldonado was charged with 101 felony counts and convicted of 100, with dozens of enhancement allegations found true. Of Maldonado's convictions, 60 were convictions of forcible rape while acting in concert (Pen. Code,¹ § 264.1); 34 were for forcible oral copulation while acting in concert (§ 288a, subd. (d)); and four were for forcible sodomy while acting in concert (§ 286, subd. (d)).² Maldonado was sentenced to a total of 862 years in prison.

DISCUSSION

The trial court instructed the jury on aiding and abetting with CALCRIM Nos. 400, 400A, and 401 as follows:

“A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. Two, he or she may have aided and abetted someone else, who committed the crime. In these instructions, I will call that other person the ‘perpetrator.’

¹ All further statutory references are to the Penal Code.

² We will refer to these 98 crimes as “the in-concert offenses.”

A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.

“Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.

“Those who aid and abet a crime and those who directly perpetrate the crime are principals and equally guilty of the commission of that crime. You need not unanimously agree, nor individually determine, whether the defendant is an aider and abettor or a direct perpetrator.

“The individual jurors themselves need not choose among the theories so long as each is convinced beyond a reasonable doubt of defendant’s guilt.

“To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

“1. The perpetrator committed the crime;

“2. The defendant knew that the perpetrator intended to commit the crime;

“3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

“AND

“4. The defendant’s words or conduct did in fact aid and abet the perpetrator’s commission of the crime.”

Maldonado claims that the trial court’s instructions on the in-concert offenses (CALCRIM Nos. 1001, 1016, 1031) conflicted with the instructions on aiding and abetting. Maldonado notes that the sex offenses are general intent offenses while aiding and abetting requires the specific attempt to assist the perpetrator, and argues that “[u]nder this set of instructions, appellant could be convicted of rape in concert even if he only had a general intent to do a particular act, but did not have the specific intent to aid and abet other perpetrator’s sex offenses.” He also contends that “the jury could have found appellant liable for all in concert offenses even if it found that appellant had no specific intent to facilitate each of the other three perpetrators’ in concert crimes.”

We find this contention to be belied by the jury instructions. The in-concert offense instructions provided two ways to convict a defendant of the sexual offense in question: to personally commit the offense and to voluntarily act with someone else who aided and abetted its commission; or to voluntarily aid and abet someone else who personally committed the offense. (CALCRIM Nos. 1001, 1016, 1031.) Maldonado appears to be focusing on the second way that a defendant could be convicted of an in-concert sexual offense, because the first involves personal commission of the offense and the second involves guilt through aiding and abetting.³ To convict Maldonado on the aiding and abetting theory, the jury would have been required to find that Maldonado voluntarily aided and abetted someone else who personally committed forcible rape, oral copulation, or sodomy.

Contrary to Maldonado's contention that the jury instructions would not have required him to have the specific intent to aid and abet another's sex crimes, the instructions did in fact delineate the requisite intent for conviction. Each in-concert instruction referred the jury back to the aiding and abetting instructions, which made clear that to find that a defendant has aided and abetted in the commission of the crime, the jury had to find beyond a reasonable doubt that the defendant had the intent to aid and abet the perpetrator in committing the crime: "Before or during the commission of the

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To convict appellant on the first theory, the jury was required to find that he personally committed the rape, forcible sodomy, or forcible oral copulation (each a general intent crime) *and* that he voluntarily acted with someone else who aided and abetted its commission. The in-concert instruction refers the jury to the aiding and abetting instructions, which make clear that it must be proven beyond a reasonable doubt that "[b]efore or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime." (CALCRIM No. 401.) To convict Maldonado on this theory, the jury would have had to have concluded that he committed the sexual offense and that the other perpetrators had the specific intent to aid and abet him. Maldonado's arguments that he could have been convicted without having the requisite specific intent to aid and abet do not appear to pertain to this basis for conviction, for under this theory Maldonado would have been aided and abetted by another rather than aiding and abetting another participant.

crime, the defendant intended to aid and abet the perpetrator in committing the crime.” (CALCRIM No. 401.) In order to find Maldonado guilty on this theory, the jury would have had to find that he had a specific intent to aid, facilitate, encourage, or instigate another perpetrator’s commission of the sexual offense in question. Contrary to Maldonado’s assertion, therefore, the jury could not have found Maldonado guilty of the in-concert offenses on an aiding and abetting theory unless it found that he had the specific intent to facilitate the perpetrator of the sexual offense.

The court correctly instructed the jury that to convict Maldonado for the charged in-concert offenses, the prosecution was required to prove that Maldonado either personally committed a specific count while voluntarily acting with someone else who aided and abetted its commission, or that he had specifically intended to aid, encourage, facilitate, encourage or instigate another’s act of committing that count. This was proper and sufficient. (See *People v. Keovilayphone* (2005) 132 Cal.App.4th 491, 496-497.) Maldonado has not demonstrated any conflict in the jury instructions on the requisite mental state for the in-concert sexual offenses.

DISPOSITION

The judgment is affirmed.

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ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.